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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

IN RE MUSICAL INSTRUMENTS AND EQUIPMENT ANTITRUST LITIGATION

This Document Relates To:

ALL ACTIONS

Case No. 09-md-02121-LAB-DHB

MDL No. 2121

CLASS ACTION

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

Date: May 21, 2012
Time: 2:00 p.m.
Place: Courtroom 9, 2nd Floor

The Hon. Larry A. Burns, District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Defendants have moved to dismiss the Second Amended Consolidated Class Action Complaint,[1] but have failed to meet their burden under Federal Rule of Civil Procedure 12(b)(6) to show that no claim has been stated. Picking selectively from this Court's prior order and the amended complaint, and relying on cases that concern deficiencies of proof at summary judgment or trial, Defendants argue that Plaintiffs have not proven their claims. Plaintiffs' complaint is not held to a summary judgment standard, however. *See* 2 Areeda & Hovencamp, *Antitrust Law*, § 307d1 (3d ed. 2007) ("The 'plausibly suggesting' threshold for a conspiracy complaint remains considerably less than the 'tends to rule out the possibility standard' for summary judgment."). Nor must Plaintiffs allege the specific who, what, where and why of a conspiracy. *See Starr v. Sony BMG Music Entertain.*, 592 F.3d 314, 325 (2d Cir. 2010) (*Starr*); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 599 F. Supp. 2d 1179, 1184 (N.D.Cal. 2009) (*LCDs*); *Babyage.com, Inc. v. Toys "R" Us, Inc*., 2008 WL 2644207, at *4 (E.D.Pa. July 2, 2008) (*Babyage.com*).

Here, the complaint—which draws upon the investigation of counsel, available pricing data, limited discovery and an FTC investigation of collusive practices in the music products industry—contains enough factual detail "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*Iqbal*) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (*Twombly*)). Plaintiffs identify the specific context and nature of the Defendants' agreements and combined actions to fix the retail prices of guitars and guitar amplifiers, making the complaint "'more than sufficient to suggest an agreement was made.'" *In re Aftermarket Filters Antitrust Litig*., No.08-C 4883, 2009 WL 3754041, at *3 (N.D. Ill., Nov. 5, 2009) (quoting *Twombly*, 550 U.S. at 556)). In particular, the complaint alleges:

- The context of the conspiracy: Prior to the conspiracy, Defendants faced new retail price competition from internet and big box retailers. Guitar Center and the Manufacturing Defendants capitalized on their substantial market power to chill competition from these new market competitors by agreeing to implement and strictly enforce Minimum Advertised Pricing ("MAP") Policies. (SAC, ¶¶ 3-10, 61-62, 71-72, 74, 76-78, 80, 83, 85, 88-90, 93, 107, 130, 131, 145-146).

- The relevant terms and scope of the MAP agreements, and how Defendants used them to restrain price competition: The MAP agreements dictated the wholesale price and

[1] The Second Amended Consolidated Class Action Complaint is referred to as "SAC" or "¶¶".

minimum advertised price at which Defendants' guitars and guitar amplifiers could be advertised in print or internet advertisements, in-store signage or displays, and had strict enforcement provisions (including loss of dealer authorization) to ensure compliance. (SAC, ¶¶ 96-97). Defendants used and strictly enforced the MAPs in order: (a) to fix the published retail prices—referred to in the industry vernacular as the "street price"—for the Manufacturing Defendants' guitars and guitar amplifiers; and (b) prevent internet, mass merchants or other low-cost retailers from using their competitive advantages to offer consumers discounts or lower-retail prices. (¶¶ 9-10, 88-90, 93, 95-97, 107-108).

- Evidence of Defendants' participation a horizontal ("rimmed wheel") conspiracy: Each Defendant was a prominent member of NAMM and regularly attended NAMM events where, as alleged by the FTC, they "met and discussed strategies for raising retail prices, and exchanged information on competitively-sensitive subjects – prices, margins, MAPs and their enforcement." (SAC, ¶¶ 36-43, 100-101, 111-129, 132-137).

- Parallel conduct coupled with circumstances negating independent action: The MAPs were not independent contracts that were implemented or enforced unilaterally. (SAC, ¶¶11, 74, 100). Historically, the Manufacturing Defendants distributed their guitars and guitar amplifiers without MAPs. (¶¶ 7, 38-42, 95). Starting in about 2004, in response to pressure from Guitar Center, Defendants abruptly changed their behavior and simultaneously enacted MAPs for their guitars and guitar amplifiers—ending decades of unMAPed price competition. (¶¶ 8, 62, 74, 76, 94-95, 145-146). Defendants knew or were assured that co-conspirators would implement and enforce the MAPs to eliminate discount pricing by internet or mass merchant retailers. (¶¶ 11, 13, 85, 98, 100-101, 114-116, 123, 125-126, 137). Defendants and their co-conspirators were motivated to enter into the conspiracy by a common desire to increase profit margins and restrain price competition from internet or mass merchant retailers. (¶¶ 11, 13, 74, 85-86, 95, 105-106, 116, 123, 125-126, 130-131).

- Defendants' collective action was economically more attractive: The market instability created by internet or mass market competitors impacted Defendants simultaneously and equally. Under prevailing market conditions, the Defendants' independent pursuits would have contravened their collective interest. As prior industry experience had shown, partial implementation or inconsistent enforcement of MAPs would not have enabled Defendants to concurrently increase, stabilize or maintain the retail or "street" prices for guitars and guitar amplifiers market-wide. (SAC, ¶¶ 86-88, 104-107).

- Historic price increases were consistent with the formation of a conspiracy: After years of steady decline, the retail prices for guitars and guitar amplifiers leveled off in 2004, rose through 2007, and fell after the FTC investigation in 2008. (SAC, ¶¶ 150-155.)

Defendants also argue that the complaint's allegations with respect to NAMM's role in the conspiracy, and the relevant product market, are not alleged with particularity. The Court disposed of these arguments in its prior ruling, and should do so again here. The motion to dismiss should be denied.

ARGUMENT

I. THE COMPLAINT STATES A CLAIM FOR VIOLATION OF THE SHERMAN ACT.

A. The Complaint Must Be Reviewed as a Whole in Determining Whether Plaintiffs Allege a Plausible Violation of the Antitrust Laws.

Defendants' omnibus motion[2] suffers three fundamental defects with respect to the standards this Court must apply in determining whether Plaintiffs have stated a plausible violation of the antitrust laws.

First, Defendants repeatedly parse Plaintiffs' allegations and ask the Court to decide whether any particular allegation, standing alone, is sufficient to state a plausible violation of the antitrust laws. Defendants misconstrue the applicable standard. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).[3] In determining whether a complaint states "a plausible claim on its face," the Court must look to the complaint as a whole, and not independently scrutinize its component parts. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004) (*Flat Glass*). A court should not parse or dismember the allegations of the complaint. *See In re Pressure Sensitive Lablestock Antitrust Litig.*, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008) (Nothing in *Twombly* "contemplates [a] 'dismemberment' approach to assessing the sufficiency of a complaint. Rather, a district court must consider the complaint in its entirety without isolating each allegation for individualized review."); *accord Standard Iron Works v.*

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[2] Defendants Guitar Center, Inc. ("Guitar Center"), National Association of Music Merchants, Inc. ("NAMM"), Yamaha Corporation of America ("Yamaha"), Fender Musical Instruments Corp. ("Fender"), KMC Music, Inc. ("Kaman"), Gibson Guitar Corp. ("Gibson') and Hoshino (U.S.A.), Inc. ("Hoshino") all join in the motion. (*See* Dkt. No. 181-1). Defendants Yamaha, Fender, Kaman, Gibson and Hoshino, when referred to collectively, are referred to as "the Manufacturing Defendants."

Guitar Center is the country's dominant music retailer; it sells approximately 30% of all musical instruments and related products sold in the United States and is a critical outlet for the Manufacturer Defendants' guitars and guitar amplifiers. (SAC, ¶¶ 37, 69-77). The Manufacturing Defendants are among the largest U.S. manufacturers of guitars and guitar amplifiers and, collectively, possess significant market power over the guitar and guitar amplifier market. (¶¶ 80-84). Guitar Center and the Manufacturing Defendants are among the most influential members of NAMM, the leading musical instrument trade association. (¶¶ 13, 36, 43, 93, 130).

[3] A claim is facially plausible where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted); *see also Twombly*, 550 U.S. at 556; *Starr*, 592 F.3d at 321.

ArcelorMittal, 639 F. Supp. 2d 877, 902 (N.D. Ill. 2009) (*ArcelorMittal)* ("Defendants' attempt to parse the complaint and argue that none of the allegations (i.e., quoted public statements, parallel capacity decisions, trade association and industry meetings) support a plausible inference of conspiracy-is contrary to the Supreme Court's admonition that '[t]he character and effect of a conspiracy are not to be judge by dismembering it and viewing its separate parts.'") (citation omitted)).

Construing the complaint as a whole fulfills the Supreme Court's mandate that Plaintiffs' factual allegations be placed in context. *See Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief…[is] a context specific task that requires the reviewing court to draw on its judicial experience and common sense."). Context is particularly important in antitrust litigation where "motive and intent play leading roles," and "the proof is largely in the hands of the alleged conspirators." *Poller v. Columbia Broad. Sys., Inc*., 368 U.S. 464, 473 (1962).

Second, relying on *Kendall v. Visa U.S.A*., 518 F.3d 1042 (9th Cir. 2008) (*Kendall*), Defendants argue that Plaintiffs must identify specific dates and meetings where any conspiratorial conduct allegedly occurred, list the identities of all those who participated or attended, and state exactly what was said or agreed to there. *See* Dkt. No. 181-1 at 3:15-18. Plaintiffs overstate *Kendall*'s holding. In *Kendall*, plaintiffs sued various credit companies and banks alleging conspiracy to set fees charges to merchants for credit card sales. The plaintiffs alleged no facts regarding the banks' role in the conspiracy beyond the collective legal conclusion that the banks "knowingly participated in the alleged scheme." *Id.* at 1048. Without more factual content, the "banks," which were large institutions with hundreds of employees, entering into contracts and agreements daily, would have not idea how to respond to the allegations of a conspiracy. *Id.* at 1047. The court concluded that such "naked" assertions of conspiracy stopped short of crossing the line between possibility and plausibility. *Id.* at 1048.

Unlike *Kendall*, as discussed below, Plaintiffs allege dates and locations during which Defendants reached an anticompetitive agreement to implement and enforce MAPs for guitars and guitar amplifiers, and provide a number of circumstantial facts within a context "that reasonably tend[] to prove that [Defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). In complaints with similar levels of particularity, courts have found that plaintiffs stated sufficient facts to allege plausible antitrust conspiracies.

See Starr, 592 F.3d at 325 (reversing district order granting motion to dismiss, and rejecting argument that "*Twombly* requires that a plaintiff identify the specific time, place or person involved in each conspiracy allegation."); *Babyage.com*, 2008 WL 2644207, at *4, fn. 4 (denying motion to reconsider order on defendants' motion to dismiss , distinguishing *Kendall*: "[B]oth complaints contain sufficient factual heft to support allegations of concerted action between [defendants]."). More detailed allegations as to person, place and time are not required. *In re Packaged Ice Antitrust Litig*, 723 F. Supp. 2d, 987, 1007 (E.D.Mich. 2010) (*Packaged Ice*) (discussing *Twombly* and *Kendall* and explaining: "[i]f the facts alleged give adequate notice to the parties of the claims and raise a reasonable expectation that discovery may lead to evidence of an illegal agreement, more specific allegations as to person, place and time are not necessary.").

Third, Defendants contend that Plaintiffs must "plead specific facts about what the specific officers of each manufacturer did" in furtherance of the conspiracy. *See* Dkt. No. 181-1 at 7:18-19. Defendants offer no legal support for this assertion. In fact, courts take a contrary view, and hold that elaborate, defendant-by-defendant pleading is not needed to state a plausible Section 1 claim. *See Beltz Travel Serv., Inc. v. Int'l Air Trans. Ass'n*., 620 F.2d 1360, 1367 (9th Cir. 1980) ("Participation by each conspirator in every detail in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be performing different tasks to bring about the desired result."); *In re NASDAQ Market-Makers Antitrust Litig*., 894 F. Supp. 703, 712 (S.D.N.Y. 1995) ("Plaintiffs in this District have not been required to specify individual acts of each defendant in an antitrust conspiracy allegation."); *LCD*s, 599 F. Supp. 2d at 1184 ("[T]he amended consolidated complaints more than adequately allege the involvement of each defendant and put defendants on notice of the claims against them. Contrary to defendants' suggestion, neither *Twombly* nor the Court's prior order requires elaborate fact pleading."); *In re: Static Random Access Memory (SRAM) Antitrust Litig*., 580 F. Supp. 2d 896, 903-04 (N.D.Cal. 2008) (*SRAM*) (rejecting argument that defendant must allege how each individual defendant participated in the conspiracy).

The question for the Court is whether the complaint, viewed as a whole, "raises a right to relief above the speculative level," by placing the Defendants in a context that suggests anticompetitive agreements, and providing "fair notice of what…the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (*Erickson*). The complaint meets this pleading standard, as explained below.

B. The Complaint's Allegations—Viewed in Context and as a Whole—Plausibly State A Claim for Violations of the Sherman Act.

Business practices that fix price, either directly or indirectly, shortchange free market forces from forging prices. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Consequently, section 1 of the Sherman Act forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. The crucial question in a Section 1 case, therefore, is whether the challenged conduct "stem[s] from independent decision or from an agreement, tacit or express." *Theater Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954).

How the Court analyzes that question depends on the procedural setting. For purpose of summary judgment, a plaintiff must offer evidence that "tend[s] to rule out the possibility that the defendants were acting independently." *Twombly*, 550 U.S. at 554 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). To survive a motion to dismiss, however, the standard is far less demanding. A plaintiff need only allege "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556, 570.

"[D]irect allegations of conspiracy are not always possible given the secret nature of conspiracies. Nor are direct allegations necessary." *In re Graphics Processing Antitrust Litig.*, 540 F. Supp. 2d 1085, 1096 (N.D.Cal. 2007) (*GPUs II*). Accordingly, a plaintiff may either plead an express agreement, or state circumstantial facts that "raise[] a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557.

Twombly does "not require heightened fact pleading of specifics.": a complaint will be upheld as long as the plaintiff alleges "enough fact" or a "circumstance" that, taken as true, "point[s] toward a meeting of the minds" *Twombly*, 550 U.S. at 555, 570.[4] The allegations need only raise a plausible inference of agreement. They do not need to raise a probable inference of agreement. *Id.* at 556. And, even if it is "improbable," or "remote and unlikely" to a "savvy judge" that the allegations will be proved during

[4] In *Erickson*, decided barely two weeks after *Twombly*, the Supreme Court reaffirmed that under Rule 8(a)(2) "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what…the claim is and the grounds upon which it rests,'" accepting all well-pleaded allegations in the complaint and drawing all reasonable inferences in favor of the moving party. *Erickson*, 551 U.S. at 93.

discovery, allegations which raise a plausible inference of agreement must be permitted to go forward. *Id*

1. Plaintiffs Allege A Plausible Combination Or Conspiracy in Restraint of Trade.

Viewed in context and as a whole, the allegations in the complaint plausibly allege the Defendants' participation in an agreement, combination or conspiracy to violate Section 1 of the Sherman Act.

Plaintiffs allege a combination or conspiracy among Defendants formed for the purpose and effect of raising, fixing or stabilizing the retail prices of guitars and guitar amplifiers. The complaint alleges the conspiracy was effectuated by a series of vertical restraints on trade, in the form of Minimum Advertised Price (MAP) agreements entered into in approximately 2004, which were implemented and adhered to as between the Manufacturer Defendants, on the one hand, and Guitar Center and other retailers, on the other. (SAC, ¶¶ 8-9, 85, 86-95, 107-108). The Manufacturing Defendants also combined or conspired with one another, to implement a horizontal restraint on trade,[5] by adopting and enforcing MAPs that were similar in scope (in terms of similar wholesale and minimum advertising pricing terms for Defendants'products, similar advertising restrictions, and similar enforcement provisions), with the knowledge and assurance that the other Defendants would require Guitar Center and other retailers to adhere to the MAPs as part of their written retail distribution contracts. (¶¶ 8, 11, 95-98, 100-101, 116).[6] Lacking evidence of an overt agreement, the FTC looked to similar facts—i.e., distributors' collective enactment of MAPs containing substantially similar terms within a 3 to 4 year time frame—as evidence suggestive of an agreement among retailers and distributors to fix the retail prices of music CDs. *See* FTC Complaint, *In re Matter of Sony Music Entertainment, Inc*., FTC Dkt. No. C-3971, 2000 WL 1257796 , at *1-2 (F.T.C. Aug. 30, 2000); *see also Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 931-36 (7th Cir. 2000) (*Toys "R" Us*) (inferring horizontal restraint of trade in violation of Sherman Act from toy retailer's orchestration of vertical agreements among manufacturers to curb sales of toys to discount clubs).

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[5] Horizontal agreements to fix prices are "manifestly anticompetitive" and the most serious violation of our antitrust laws. *See Leegin Creative Leather Prods. v. PSKS, Inc.,* 551 U.S. 887 (2007)

[6] The complaint alleges a "hub-and-spoke" combination or conspiracy. The MAPs are vertical agreements restraining trade—the spokes. The agreement, combination or conspiracy among the Manufacturing Defendants to simultaneously require and enforce the MAPs (in an abrupt change from past behavior) is a horizontal restraint on trade—and constitutes the rim or wheel of the conspiracy. The complaint alleges that Guitar Center was at the hub of the conspiracy. (¶¶ 8, 93). NAMM's role in the conspiracy is discussed in Section III, below.

Plaintiffs further allege that the Defendants' combination or conspiracy to implement and enforce the MAPs served no legitimate pro-competitive purpose. Rather, Plaintiffs allege, the Defendants formed the conspiracy for the purpose of raising, fixing or stabilizing the published retail (or "street") price for Manufacturing Defendants' guitars and guitar amplifiers, by preventing internet, mass merchant or other low-overhead retailers from using their competitive advantages to offer discount- or lower retail pricing. (SAC, ¶¶ 9-10, 88-90, 93, 95-97, 107-108). The alleged conspiracy succeeded in bringing about its intended effects—to the detriment of consumers. After years of market competition and steadily declining prices, the retail prices that U.S. consumers paid for guitars and guitar amplifiers leveled off and rose during the conspiracy period. (¶¶ 150-155).[7]

These facts allege a plausible conspiracy and restraint of trade. The Supreme Court declared decades ago that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" is an unlawful price-fixing restraint. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). *See also Babyage.com*, 2008 WL 2644207, at *4 (denying motion to reconsider order on defendants' motion to dismiss indirect allegations of parallel conduct in the form of imposition of minimum retail price maintenance policies in light of "plus factors" identified in prior order).

2. Plaintiffs Have Pled The Terms of The MAPs and Facts to Show How They Restrained Competition.

Plaintiffs' complaint sufficiently identifies the subject of the alleged conspiracy—the MAPs and their implementation and enforcement. (SAC, ¶¶ 9-10, 85, 93, 95-97, 100, 107-108). In granting leave to

[7] The complaint contains financial data showing an increase in the number of units sold and a decrease in the average price per unit from 1997 to 2004, followed by a slight drop in the number of instruments sold accompanied by steady or slightly increased prices from 2005 to 2008. (Guitars increased in price after 2004, and amplifiers increased slightly or held steady). Average retail prices for guitars and guitar amplifiers fell somewhat in 2008, after the FTC announced its investigation into price-fixing in the music products industry. (¶¶ 150-155).

amend, the Court instructed Plaintiffs to "plead enough of the[se] MAPs' terms to show how they restrained competition" in the manner Plaintiffs have alleged. Dkt. No. 45 at 10:16-18.

Plaintiffs have followed the Court's directive. The amended complaint alleges that, in approximately 2004 and continuing through approximately 2007, each of the Manufacturing Defendants simultaneously adopted MAP agreements that dictated the wholesale, MSRP and minimum advertised prices at which Defendants' guitars and guitar amplifiers could be communicated to the public. (SAC, ¶¶ 6-7,). These MAPs differed from Defendants' prior MAPs and pricing practices. For several decades prior to 2004, Plaintiffs allege, the Manufacturing Defendants generally distributed their guitars and guitar amplifiers through retailers without MAPs. (¶¶ 7, 38-42, 95). Although some Defendants had MAPs prior to 2004, these MAPs did not extend to all instruments or product lines, did not contain comprehensive advertising restrictions, and were not strictly or uniformly enforced. (¶¶ 7, 86-87, 91).

Starting in approximately 2004, however, in response to pressure from Guitar Center, the Manufacturing Defendants simultaneously enacted MAPs containing similar pricing terms and advertising restrictions for the guitars and guitars amplifiers in their product lines. (SAC, ¶¶ 8, 62, 74, 76, 94-95, 145-146).[8] Unlike Defendants' prior pricing policies, Plaintiffs allege that these new MAP agreements: (1) applied to all of the Manufacturing Defendants' guitars and guitar amplifiers (including instruments or guitar amplifiers that had been distributed and sold since the 1940s, '50s, '60s, '70s or '80s) (¶¶ 7-8, 38-42, 95, 96(a), 97); (2) specified the wholesale, MSRP and minimum advertised retail price at which the Manufacturing Defendants' guitars and guitar amplifiers could be advertised or promoted for sale to consumers (¶¶ 9, 12, 95, 96(b)-(c); 97); (3) extended MAP advertisement restrictions to all internet, "call for price," in-store pricing, signage and product displays, as well as to all print and media advertisements (¶¶ 9, 90-92, 96(d)-(e), 97); and (4) conditioned dealer authorization or the availability of cooperative advertising funds upon compliance with the MAPs and their advertising restrictions. (¶¶ 9, 96(f), 97, 98).

As collectively enacted and enforced, Plaintiffs allege these new MAPs restrained competition by preventing internet, mass merchant and other retailers with low overhead or other competitive retail

[8] The limited discovery allowed under the Court's prior order, as well as counsel's independent investigatory efforts, enabled Plaintiffs to confirm their allegations that each Manufacturing Defendant had adopted a MAP agreement for its guitars and guitar amplifiers as of 2004. *See* SAC, ¶¶ 96-98.

advantages from publicly offering consumers discount or lower retail prices for Defendants' guitars and guitar amplifiers. (¶¶ 9-10, 90, 99, 107). The MAPs, and Defendants' collective agreement to implement and enforce them, also enabled Defendants to fix, stabilize or maintain the "street" or retail price that consumers expected to pay—and allegedly did pay— for the Manufacturing Defendants' guitars and guitar amplifiers, by comprehensively dictating the minimum retail prices that were publicly communicated to consumers in all pricing and advertisement mediums in the marketplace. (¶¶ 9-10, 50-55, 98-99, 108).[9] Similarly pleaded facts have been held, by both courts and the FTC, to plausibly suggest anticompetitive conduct. *See generally, NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 107 (1984) ("[A] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with…antitrust law."); FTC Complaint, *In re Matter of Sony Music Entertainment, Inc*., 2000 WL 1257796, *1-2 (records distributors' implementation and enforcement of MAP polices for music CDs alleged to "restrain trade unreasonably and hinder competition in the retail and wholesale markets for pre-recorded music"); *Babyage.com*, 2008 WL 2644207, at *3 (denying Rule 12(b)(6) motion to dismiss, finding that complaint alleging concerted action among manufacturers and retailers of baby and juvenile products who entered into minimum retail price maintenance (RPM) policies stated plausible price-fixing conspiracy: "minimum RPM…prevents a [manufacturer] from allowing a retailer to discount its products below the declared minimum.").

Although Plaintiffs have amended their MAP allegations as instructed, Defendants insist that Plaintiffs must do more. Defendants argue that, to survive a 12(b)(6) motion to dismiss, the complaint must go beyond pleading the relevant terms of the MAPs at issue. According to Defendants, the complaint must also recite the specific text of each Defendants' MAP policy, and provide details as to how the specific text of one MAP policy corresponds to the text of another. *See* Dkt. No. 181-1 at 10:4-27 (citing *Twombly*, 550 U.S. at 555; *William O Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009) (quoting *Kendall*, 518 F.3d at 1047: ("[C]laimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts"). Defendants thus present Plaintiffs, and the Court, with a Catch-22. While

[9] Plaintiffs discuss the facts or circumstances alleged in the complaint that "raise[] a suggestion of a preceding agreement," *Twombly*, 550 U.S. at 557, in Section II.B.3, below.

acknowledging that the documentary evidence they believe is necessary to recite the actual text of the MAPs exists, *see* Dkt. No. 181-1 at 5:12-14, Defendants urge dismissal based solely on Plaintiffs' inability to "prove up" their allegations with evidence that Defendants say they have but have refused to produce. The Court should reject Defendants' argument, for two reasons.

First, Defendants' fundamentally misconstrue Plaintiffs' allegations. Here, Plaintiffs do not allege that the Defendants engaged in a collaborative, joint drafting exercise to ensure that the text of each Defendant's MAP policy matched, word-for-word, the text of the others' MAP policies. Rather, Plaintiffs' complaint is that Defendants conspired and agreed to implement and enforce MAP policies that were substantially similar in structure, scope, and in their advertising restrictions, such that the MAPs could be used by the Defendants to achieve their conspiratorial goal, which was to prevent internet, mass merchant and other low cost retailers from publicly offering consumers discounts or lower retail prices for the Manufacturing Defendants' guitars and guitar amplifiers, and to bring about the conspiracy's intended effect, which was to fix the published "street" or retail price for the Defendants' guitars and guitar amplifiers in the marketplace.[10] (SAC ¶¶ 9-10, 50-55, 90, 98-99, 107-108). It is not reasonable to assume that Defendants would want to copy the text of each other's MAP policies in the course of this endeavor. Such obvious duplication would send up a "red flag," alerting regulators and others to the conspiracy.

Second, Defendants misread *Kendall*. As the district court observed in the *Babyage.com* case, "*Kendall* stands for the "unremarkable" principle that parallel conduct, alone, is insufficient to state a Sherman § 1 claim." *Babyage.com*, 2008 WL 2644207, at *4, fn.4. "*Kendall* does not require a plaintiff to prove its case or include every factual detail in support of its claim in its complains. Rather, …*Kendall* requires a plaintiff to include sufficient facts supporting the existence of a conspiracy, beyond the conclusory allegation that a conspiracy did exist." *Stanislaus Food Products Co. v. USS-POSCO Industries*, 2011 WL 2678879, at *5 (E.D.Cal. July 7, 2011) (rejecting defendants' argument that plaintiffs

[10] Nor was the precise wording of the Defendants' MAP policies of concern to the FTC. The anticompetitive conduct alleged in the complaint filed by the FTC was that NAMM had organized various meetings and programs at which competing guitar and amplifier retailers and others "were permitted and encouraged to discuss strategies for implementing MAPs, the restriction of retail price competition, and the need for higher prices." (SAC, ¶ 134, citing FTC Complaint filed April 8, 2009 in *In the Matter of National Association of Music Merchants, Inc.*, FTC Docket No. C-4255, 2009 WL 1102975 (F.T.C. Apr. 8, 2009)). (emphasis added))

must plead facts of documents evidencing unlawful agreement); *see also In re ATM Fee Antitrust Litig.*, 768 F. Supp. 2d 984, 1003-04 (N.D.Cal. 2009) (discussing *Kendall* and finding allegations sufficient where defendants "are certainly on notice as to how they were involved with the alleged unlawful scheme.").

Here, in stark contrast to *Kendall*, Plaintiffs allege specific facts regarding the timing of the MAPs' implementation (when), the similar terms and advertising restrictions contained therein (what), that all Manufacturing Defendants required them (who), and facts to show how NAMM, Guitar Center and the Manufacturing Defendants combined or conspired to use the MAPs to restrain retail price competition and raise, fix or stabilize the retail prices for Defendants' guitars and guitar amplifiers in the marketplace (how). (SAC, ¶¶ 7-8, 12, 38-42, 62, 74, 76, 94-98, 107-108, 145-146).

Plaintiffs have done what the Court has asked of them. They have pled the key terms of the MAPs, alleged facts connecting the MAPs to the circumstances of alleged conspiracy and the entities involved, and stated facts that plausibly show how the MAPs were used by the Defendants to unlawfully restrain trade – allegations that go well beyond labels, legal conclusions and the "bare assertion of a conspiracy." *Kendall*, 518 F.3d at 1047. These allegations provide sufficient factual detail to "'give the [D]efendant[s] fair notice of what [Plaintiffs']…claim is and the grounds upon which it rests.'" *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555).

3. Plaintiffs Allege Facts That Support an Inference of a Conspiracy.

Conspiracies, by their nature, are "rarely susceptible of direct proof." *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 671 (9th Cir. 1980). *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (*High Frustose*) ("most cases are constructed out of tissue of such [ambiguous] statements and other circumstantial evidence, since outright confession [of conspiracy] would ordinarily obviate the need for a trial."). The Supreme Court, in *Twombly*, recognized this reality. Thus, *Twombly* holds, where a complaint asserts parallel conduct "in a context that raises a suggestion of a preceding agreement," an antitrust claim may be supported. 550 U.S. at 557.

Twombly identifies examples of parallel conduct allegations that would be "plausible grounds to infer an agreement," including "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among parties." *Id* at 556, 557 n.4 (citing, among other commentators, 6 Areeda & Hovencamp, Antitrust

Law, ¶ 1425 (2d ed. 2003), and Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. Sch. L. Rev. 881, 899 (1979)). Plaintiffs' allegations fit neatly within *Twombly*'s framework.

(a) Context and Facts Suggestive of Motive to Conspire.

Plaintiffs have statisfied *Twombly* by putting Defendants conduct "in a context that raises a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557. The complaint places the start of the alleged conspiracy back in the early 2000's, when internet retail was relatively novel, and big box and mass merchant retailers were beginning to expand their inventory to include guitars and guitar amplifiers. (SAC, ¶¶ 6-7, 10, 86-92). Plaintiffs allege these new retail competitors had competitive advantages (e.g., wholesale purchasing power, economy of sale, comparatively lower overhead and decreased costs) over traditional music retailers such as Guitar Center. (¶¶ 9-10, 88)

To forestall innovation by these new retail merchants, and to protect its own substantial market share, Guitar Center was motivated to enter into MAP agreements with the Manufacturing Defendants, and to join with Defendants in enforcing them, "in order to continue [to enjoy] its advantages over small independent retailers (name recognition, volume discounts from wholesalers, etc.), stave off competition from new market entrants with lower overhead costs, increase Guitar Center's profits, and remain the dominant specialty music retailer." (SAC, ¶ 106).[11] Plaintiffs allege that collective adoption and implementation of the MAPs benefitted the Manufacturer Defendants, because it permitted them to stabilize and increase wholesale prices for their guitars and guitar amplifiers. (¶ 105). NAMM, the music products industry trade association, was motivated to further the conspiracy, because it protected NAMM's most influential members from price competition by emerging internet-based and other low-cost retailers, and because it allowed NAMM's members to maintain higher retail prices and profit margins. (¶ 130).

The Seventh Circuit, in *In re Text Messaging Antitrust Litig*, 630 F.3d 622 (7th Cir. 2010) (*Text Messaging*), looked to similar circumstantial facts in upholding a complaint against a Rule 12(b)(6) motion.

[11] The key advantage of the alleged conspiracy to Guitar Center was that the MAPs, if they covered substantially all of the guitars and guitar amplifiers in its inventory, and assuming they were enforced, would ensure a single published retail or "street" price for the Manufacturing Defendants products in the retail marketplace, In other words, by effectively creating one published market price, consumers would not be drawn to discount retailers' websites or big box stores. (*See* SAC ¶ 107).

In that case, plaintiffs alleged cellular phone service providers conspired to impose artificially high prices for text messaging services. *Id* at 624. In *Text Messaging*, as here, the complaints alleged "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion." *Id*. at 627. These allegations included parallel pricing structures, involvement in a trade association whose leadership encouraged unity within the industry, anomalous pricing behavior, and uniform changes in pricing structures. *Id.* at 627-28. There, as here, the plaintiffs did not allege "the smoking gun in a price-fixing case: direct evidence." *Id*. at 628. Despite this lack of direct evidence, the Seventh Circuit held that plaintiffs' alleged contextual and circumstantial facts provided a "sufficiently plausible case of price fixing." *Id*. at 629.

(b) Abrupt Changes in Defendants' Prior Business Practices.

Plaintiffs' complaint alleges that the Manufacturing Defendants had successfully distributed their guitars and guitar amplifiers to retailers without the necessity of MAP agreement, for several decades. (SAC, ¶¶ 7, 95). Even as MAPs began to emerge as an industry pricing tool in the late 1990's, they were not comprehensive and were not enforced. (¶¶ 86-87). Plaintiffs allege that Defendants' business practices abruptly changed, starting in around 2004, when the Manufacturing Defendants all implemented comprehensive MAP policies (covering all or virtually the guitars and guitar amplifiers in their production lines) containing similar restrictions concerning the minimum retail price at which Defendants' guitars and guitars amplifiers could be communicated to the public. (¶¶ 93, 96).

This type of conduct—abrupt departure from prior business methods—adds plausibility to Plaintiffs' allegations of coordinated conduct. *See generally Interstate Circuit v. U.S.*, 306 U.S. 208, 222 (1939) ("it taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join"); *ArcelorMittal*, 639 F. Supp. 2d at 900 (finding that parallel, novel conduct "suggests some sort of preceding agreement among the actors involved"); *Toys "R" Us*, 221 F.3d at 935 (drawing inference for conspiratorial conduct between retailer and distributers from nature of vertical agreements, the manner in which they were made, the substantial unanimity of action taken and the absence of a benign motive).

(c) Collective Adoption and Enforcement of Agreements.

Plaintiffs allege that the Defendants' parallel conduct of entering into, implementing and strictly enforcing MAPs was parallel in time as well as in scope. (SAC, ¶¶ 93, 96-98, 103). These allegations add further plausibility to Plaintiffs' claims. *See* FTC Complaint, *In re Matter of Sony Music Entertainment, Inc*., 2000 WL 1257796, at *1-2 (alleging distributors' collective enactment of MAPs containing substantially similar terms within a 3 to 4 year time frame as evidence suggestive of an agreement among retailers and distributors to fix the retail prices of music CDs).

(d) Coordination Was Needed to Obtain Intended Benefits of MAP Agreements.

Plaintiffs allege new market changes—the advent of internet retail and increasing market penetration by mass merchant or discount stores—that impacted the Manufacturing Defendants, Guitar Center, and other traditional brick and mortar music product retailers similarly. (SAC, ¶¶ 6, 88, 93, 100). Under prevailing market conditions, Plaintiffs allege, had only one or two Manufacturing Defendants agreed to impose price and advertising restrictions for their guitars and guitar manufacturers, these efforts would not have had the effect of stabilizing retail prices, creating published retail or "street" prices for Defendants' instruments, or staving off price competition from emerging low cost retail competitors. (¶¶ 12, 104). Allegations such as these--which infer that price restraints succeed only when competitors with sufficient aggregate market power coordinate their efforts—raise a strong inference of conspiratorial conduct. *See* William Kovacic, et. al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich L. Rev. 393, 426 (2011) ("In general, if a subset of firms have sufficient market power in the aggregate and jointly engage in a dominant-firm conduct where no single firm has the market power to act unilaterally as a dominant firm, then there is a strong inference of a cartel—and thus such conduct is a super plus factor.")

(e) The FTC Investigation Bolsters The Plausibility of Plaintiffs' Claims.

Additionally, the complaint recites matters taken from an FTC investigation and complaint in which the FTC alleged that, between 2005 and 2007, NAMM organized meetings at which its members were encouraged to communicate, and did in fact share, information about prices and strategies for implementing MAPs, restricting retail price competition, and securing higher retail prices for musical instruments and

related equipment. (SAC, ¶¶ 132-144). The FTC investigation and complaint lend support to the plausibility of Plaintiffs' claims, as this Court has previously held. *See* Dkt. No. 45 at 2:15-3:17.

The allegations that are drawn from the FTC action—which are not challenged in the omnibus motion filed by Defendants and may not be challenged on reply[12]—support the plausibility of Plaintiffs' allegations that Defendants entered into the price-fixing conspiracy alleged in the complaint, in a number of respects. First, the FTC investigation involves the same key players and the same time period, and was directed to the same collusive behavior as is alleged here. (*See* SAC, ¶¶ 15, 132-34, 137, 142). Second, the FTC complaint issued after two years of investigation, including a review of subpoenaed documents obtained from each of the Defendants. (¶¶ 15, 132). The FTC asserted in the complaint that, between 2005 and 2007: "NAMM organized meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing [MAPPs], the restriction of retail price competition, and the need for higher retail prices. Representatives of NAMM determined the scope of discussion by selecting moderators and setting the agenda for these programs. At these NAMM-sponsored events, competitors [including Defendants named herein] discussed the adoption, implementation and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail prices and margins; and other competitively sensitive issues." (¶ 134 (citing FTC Complaint filed April 8, 2009 in *In the Matter of National Association of Music Merchants, Inc*., 2009 WL 1102975.) Third, as alleged by the FTC, "[F]irms also exchanged information on competitively-sensitive subjects – prices, margins, minimum advertised price policies and their enforcement." (¶ 137, quoting FTC's Analysis of Agreement).

These allegations not only lend plausibility to Plaintiffs' allegations with respect to NAMM's role in the conspiracy, they also provide facts specific probative of meetings, and exchanges of pricing and confidential business information that supply the further requisite "factual enhancement" to suggest the agreement necessary to make out a Sherman Act claim. *Twombly*, 550 U.S. at 557; *see Text Messaging*, 630

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[12] *See Zango, Inc. v. Kaspersky Lab, Inc*., 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("[A]rguments not raised by a party in an opening brief are waived."); *LaTour v. Citigroup Global Markets Inc*., No. 11CV1167-LAB RBB, 2012 WL 909319, at *1 (S.D. Cal. Mar. 16, 2012) (Burns, J.) ("[A]rguments not raised in the opening brief, and arguments 'made in passing and inadequately briefed' are waived[.]") (citing *Halicki Films, LLC v. Sanderson Sales & Marketing*, 547 F.3d 1213,1229–30 (9th Cir.2008)

F.3d at 622 ("Of note is the allegation in the complaint that the defendants belonged to a trade association and exchanged price information directly at association meetings"); *In re Southern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 940 (E.D.Tenn. 2008) (defendants' creation of a "mechanism by which they exchange and monitor price information" was one part of the "who, what, when, where" factual analysis to determine whether antitrust claim adequately was alleged); *SRAM,* 580 F. Supp. 2d at 903 (ongoing agreement to exchange price information for the purpose of price stabilization plausibly suggested a § 1 price fixing conspiracy). *Accord In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig*., 906 F.2d 432, 452 (9th Cir. 1990) (allegations that defendants exchanged price information support "an inference that the exchange of price information…was done for the purpose and effect of allowing greater coordination and stabilization of prices.")

(f) Facts Drawn From Investigation and Discovery Support Plausibility.

Plaintiffs also allege additional facts—obtained through independent investigation and discovery—that lend further support to the plausibility of their claims.

For example, Plaintiffs learned through discovery that corporate and management level personnel from each Defendant, including persons with key decision-making authority over MAPs and MAP pricing, attended or participated in each of the NAMM trade shows identified in the complaint. (*See* SAC, ¶¶ 43-101). Standing alone, this information provides circumstantial evidence of an opportunity to conspire. *See SRAM*, 580 F. Supp. 2d at 902-03 ("[S]uch participation demonstrates how and when Defendants had opportunities to exchange information or make agreements.") When considered in conjunction with other facts, however, the information presents a stronger inference of a plausible conspiracy. At a minimum, information connecting the key decision makers of each Defendant entity to the NAMM-sponsored trade shows is corroborative of the FTC's allegation, in its Complaint, that Defendants met at the NAMM shows and "discussed the adoption, implementation and enforcement of minimum advertised price policies, the details and workings of such policies; appropriate and optimal retail prices and margins; and other competitively sensitive issues" there. (¶ 134). *See In re Rail Freight Surcharge Antitrust Litig*., 2008 WL 4831214, at *7 (D.D.C. Nov. 7, 2008) (otherwise lawful acts such as attending meetings of the Association of American Railroads, a major trade association dominated by the four rail defendants, provided defendants with the means to coordinate their conspiratorial acts, and in conjunction with their total conduct, may have

become illegal acts as part of conspiracy); *In re OSB Antitrust Litig.*, 2007 WL 2253419 at *5 (E.D.Pa. 2007) (alleged confirmation of price-fixing agreement at trade shows and industry events, in context of other allegations, raised "a right to relief above the speculative level.") (quoting *Twombly*, 550 U.S. at 555).

Plaintiffs also obtained, through independent investigative efforts, an email document drafted by NAMM President, Joe Lamond, containing "talking points" on MAPs, as well as a draft "script" prepared by then-NAMM Chairman, Dennis Houlihan, for a presentation made at the NAMM Annual Meeting of Members. Mr. Lamond distributed the "talking points" to NAMM Board members to "ensure" that NAMM and it Board members were "on the same page" when discussing MAPs with manufacturers and retailers at NAMM's semi-annual trade show. (*See* SAC, ¶ 114) Mr. Houlihan's "script" contains a reference to NAMM "fulfilling its role to bring the various Member companies together to discuss critical issues including: - MAP pricing…" (*See* ¶ 115). These allegations also provide a plausible basis to infer that NAMM participated in and facilitated the alleged conspiracy.

Additionally, the complaint includes retail price data drawn from publicly-available sources. These data show that in the years leading up to the alleged conspiracy, retail unit prices for guitars and guitar amplifiers fell even as the demand for these products grew. (SAC, ¶¶ 151, 153.) Beginning in 2004, however, and throughout the period the alleged conspiracy was in effect, retail prices for guitars and guitar amplifiers increased and continued to rise—even as demand for these products fell—until the FTC's investigation in 2008. (¶¶ 150, 152-55.) These data, which evidence retail price increases that break from past industry practice, further bolster Plaintiffs' conspiracy claims. In *GPUs II*, the court explained "that 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernable reason, would support a plausible inference of conspiracy." *GPUs II*, 540 F. Supp. 2d at 1092 (citing *Twombly*, 550 U.S. at 556, n.4) Here, as in *GPUs II*, Plaintiffs allege that the markets for guitars and guitar amplifiers departed from historical pricing patterns; retail unit prices increased when the conspiracy was enforced even while demand slumped. This is in start contrast to the economic data for the pre-conspiercy period, which states that retail prices for guuitars and guitar amplifiers were falling in the late 1990's and early 2000, even as demand for these products was increasing. These allegations, coupled with other facts consistent with the alleged conspiracy, are sufficient to state a claim.

4. Plaintiffs Are Not Required to Plead Direct Evidence of Meetings.

Defendants criticize Plaintiffs for not coming forward with direct evidence that Defendants "discussed MAP policies during a private meeting at a NAMM event." *See* Dkt. No. 181-1 at 27-28. They suggest that proof connecting each Defendant to a "private meeting" at a NAMM-sponsored trade show in which a MAP policy "was discussed" with another Defendant (and ignoring co-conspirators) is required for Plaintiffs to allege a plausible antitrust claim here. *See id* at 1:22-25.

As any seasoned prosecutor knows, it is not at all unusual that Plaintiffs, and even having been afforded limited discovery, do not have documentary or testimonial proof that Defendants met in secret for a conspiratorial purpose. "[A] conspiracy is rarely susceptible of direct proof…" *Blair Foods*, 610 F.2d at 671 (emphasis supplied).

Here, however, Plaintiffs have alleged the facts described above to "raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." That is all that *Twombly* requires. *See Twombly*, 550 U.S. at 556. *Accord In re Delta/Air Tran Baggage Fee Antitrust Litig*., 773 F. Supp. 2d 1348, 1360 (N.D.Ga. 2010) ("Plaintiffs need not allege the existence of collusive communications in 'smoke-filled rooms' in order to state a § 1 Sherman claim. Rather, such collusive communications can be based on circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements regarding earnings calls, and in other public ways."); *In re Graphics Processing Antitrust Litig*., 527 F. Supp. 2d 1011, 1024 (N.D.Cal. 2007) (plaintiffs need not plead "specific back-room meetings between specific actors at which specific decisions were made.")[13]; *Wellpoint, Inc. Out-of-Network "UCR" Rates Litigation*, No. MDL 09-2074 PSG (FFMx), 2011 WL 3555610, at *11 (C.D. Cal.

[13] Defendants also strenuously argue that conspiratorial conduct cannot occur through public announcements or attendance at trade show events or meetings attended by many people. *See* Dkt. No. 181-1 at 810-9:26. Whether a meeting attended by co-conspirators is "public" or "private," is irrelevant to of the issue of whether conspiratorial conduct or an antitrust violation has occurred, *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 447 (9th Cir. 1990) ("the form of exchange—whether through a trade association, through private exchange…or through public announcement of price changes—should not be determinative of its legality.") (citation omitted)). *Accord ArcelorMittal*, 639 F.Supp at 897 ("Defendants cannot rely on the public or semi-public nature of trade meetings to immunize their statements from antitrust scrutiny").

Aug. 11, 2011) (finding Plaintiffs circumstantial allegations sufficient despite a lack of direct evidence how the agreement was reached).

The *Kendall* decision does not require that Plaintiffs come forward with direct proof of conspiratorial meetings either. Unlike *Kendall*, Plaintiffs here allege facts within a context "that reasonably tends to prove that [Defendants] had a conscious commitment to a common scheme designed to achieve an unlawful purpose." *Monsanto*, 465 U.S. at 768. In complaints with similar levels of particularity, courts have found that plaintiffs stated sufficient facts to allege plausible antitrust conspiracies. *See Starr*, 592 F.3d at 325 (reversing district order granting motion to dismiss, and rejecting argument that "*Twombly* requires that a plaintiff identify the specific time, place or person involved in each conspiracy allegation."); *Babyage.com*, 2008 WL 2644207, at *4, fn. 4 (denying motion to reconsider order on defendants' motion to dismiss , distinguishing *Kendall*: "[B]oth complaints contain sufficient factual heft to support allegations of concerted action between [defendants]."). More detailed allegations as to person, place and time are not required. *In re Packaged Ice Antitrust Litig*, 723 F. Supp.2d, 987, 1007 (E.D.Mich. 2010) (*Packaged Ice*) (discussing *Twombly* and *Kendall* and explaining: "[i]f the facts alleged give adequate notice to the parties of the claims and raise a reasonable expectation that discovery may lead to evidence of an illegal agreement, more specific allegations as to person, place and time are not necessary.").

5. Plaintiffs Have Alleged a Plausible "Rim" to the Conspiracy.

Defendants next contend that Plaintiffs have not pleaded facts to show that each Manufacturer Defendant conspired with Guitar Center as the "hub" to implement and enforce MAP policies for the anticompetitive purpose of eliminating competition and fixing or stabilizing the retail prices for the Manufacturer Defendants' guitars and guitar amplifiers. *See* Dkt. No. 181-1 at 14:11:18-12.

A claim involving a dominant retailer facilitating similar vertical restraints among its suppliers, or spokes, is a type of hub-and-spoke conspiracy sufficient to establish antitrust liability. As this Court explained in its August 22 order, the horizontal component of a "rimmed" hub-and-spoke conspiracy "involves either an agreement or understanding that other "spokes" would cooperate in the conspiracy." Dkt. No. 45 at 7:22-23 (citing *Toys "R" Us*, 221 F.3d at 931-36). Thus, to plead a plausible "rim," Plaintiffs must allege "enough factual matter (taken as true) to suggest an agreement" (*Twombly*, 550 U.S. at 556, 570)

or "understanding that the other spokes"—here, the Manufacturer Defendants—"would cooperate in the conspiracy." *Toys "R" Us*. *Id*, 221 F. 3d at 931-36.

Plaintiffs have satisfied these pleading standards. The complaint alleges facts to support the existence of an overall plan or common design. As recited above, these facts include a plausible context for the conspiracy, and sufficient circumstantial facts that Guitar Center, its suppliers (the Manufacturer Defendants), and NAMM's other retail members agreed to cooperate in an overall plan to adopt and implement MAPs for the Manufacturer Defendants' guitars and guitar amplifiers. (SAC ¶¶ 7-11, 93-100, 107). Additionally, the FTC complaint, together with information gleaned through discovery and independent investigation, plausibly connects Guitar Center, the Manufacturer Defendants and NAMM as co-participants in the conspiracy. These facts and others cited in the complaint are sufficient to infer that the Defendants "had an agreement or understanding" that their co-conspirators would cooperate in the conspiracy. See *Interstate Circuit v. U.S.* , 306 U.S. 208, 226 (1939) (finding that explicit agreement among the distributors was not required, and holding" [i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . They knew that the plan, if carried out, would result in a restraint of commerce . . . ."); *Accord Babyage.com*, 2008 WL 2644207 at *1, 4 ("Plaintiffs may allege concerted action by claiming parallel conduct coupled with circumstances that tend to negate the possibility that [a dominant retailer] and each manufacturer acted independent.")

Defendants contend that a "rimmed" conspiracy must consist of allegations that the individuals involved acted against their own business interests, and facts to show the hub gave specific assurances that the others would cooperate, to survive a pleading challenge under Rule 12(b)(6). *See* Dkt. No. 181-1 at 16:20-25 (citing *Howard Hess Dental Labs, Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237 (3rd Cir. 2010) (*Howard Hess*). *Howard Hess* does not support Defendants' argument. In *Howard Hess*, the Third Circuit followed the reasoning of the Supreme Court in *Twombly*, holding that plaintiffs must put forward allegations that create a "context that raises a suggestion of a preceding agreement." *Id*. at 255-56 (citing *Twombly*, 550 U.S. at 557). While noting that allegations of specific assurances and conduct against individual interests were examples of persuasive "plus factors" a court may consider to determine whether a

complaint alleging parallel conduct satisfies *Twombly*, at no point did the court state that such allegations are required elements of a "rimmed" antitrust conspiracy.

Defendants alternatively suggest that a manufacturer who responds to pressure from a dominant retailer cannot be deemed to be a conspirator in a horizontal conspiracy because in that instance, Defendants assert, the manufacturer is acting in its own best interests in either securing a distribution avenue for its products or responding to the complaints of a valued customer. *See* Dkt. No. 181-1 at 17:15-18:12. The question of whether a manufacturer is acting in its best interests is a question of fact and, as such, it is not the proper subject of a Rule 12(b)(6) motion. Notably, however, the argument that a manufacturer operates in its best interest, and may therefore avoid antitrust liability, when it joins with a dominant manufacturer and others in a retail price maintenance scheme that results in higher retail prices to consumers was rejected by the court in *Toys "R" Us*, 221 F. 3d at 938 (rejecting manufactures' argument that the retail maintenance agreements were designed to combat free riding by discount clubs, since the costs associated with advertising, stocking inventories, etc., were passed on to the consumer in any event).

II. THE COMPLAINT ALLEGES A PLAUSIBLE RELEVANT MARKET FOR "HIGH-END GUITARS AND GUITAR AMPLIFIERS."

Market definition for antitrust purposes involves a "deeply factual inquiry," and "for this reason a court must be hesitant to grant a motion to dismiss for failure to plead a relevant market." *Jamsports & Entm't, LLL v. Paradama Productions, Inc*., No. 02-C-2298, 2003 U.S. Dist. LEXIS 6100, at *17 (N.D. Ill. Apr. 21, 2003). There is no requirement that market definition be pled with specificity. *TYR Sport Inc. v. Warnaco Swimwear, Inc.*, 679 F. Supp. 2d 1120, 1127-28 (C.D. Cal. 2009) (denying motion to dismiss and rejecting defendants' argument that market definition was insufficient because it contained no allegations regarding interchangeability or cross-elasticity of demand). As the Ninth Circuit has explained:

> An antitrust complaint . . . survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that an alleged market suffers a fatal defect. And since the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial.

Newcal Indus, Inc v Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008).

A plaintiff satisfies the relevant market requirement if the complaint contains facts that suggest an "'area of effective competition in which buyers of the[] products can find alternative sources of supply [and] there are no other products that are interchangeable . . . . within this geographic market.'" *TYR Sport*, 679 F.

Supp. 2d at 1129 (citing *Big Bear Lodging Ass'n v. Snow Summit, Inc*., 182 F.3d 1096, 1105 (9th Cir. 1999)). A product market also may be narrowed to account for identifiable submarkets or product clusters. *See Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962); *Thurman Indus., Inc. v. Pay 'N Pak Stores*, 875 F.2d 1369, 1374 (9th Cir. 1989). Industry or public recognition of the market or submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors are among the practical criteria a Court may use to determine whether a plausible relevant market has been alleged in a particular case. *See Brown Shoe*, 370 U.S. at 325.

The complaint here satisfies these standards. It defines the relevant markets as the U.S. retail markets for new, high-end guitars and guitar amplifiers. (¶ 58) Guitars includes identifiable product clusters, *e.g.*, electric guitars, acoustic guitars, and bass guitars. *Id.* The specific products within the identifiable product clusters satisfy the requirement for interchangeability: a six-string acoustic guitar made by Fender, for example, is reasonably interchangeable with a six-string acoustic guitar made by Yamaha or Hoshino. These product markets and submarkets also are consistent with *Brown Shoe*, where the Supreme Court upheld the trial court's finding that men's, women's, and children's shoes made up separate submarkets, in light of the distinct customer groups for and the particular characteristics of each type of shoe. 370 U.S. at 326.

Plaintiffs have further refined the scope of the product market through use of the term "high-end," to distinguish the defined markets and submarkets from others markets for used or second-hand products, toys, generics, knock-offs, or unbranded products. This is sensible. While it is reasonable to infer that an electric guitar manufactured by Fender may be reasonably interchangeable with one made by Yamaha, Gibson, Kaman or Hoshino, consumers seeking to purchase a new, high-end electric guitar likely would not switch to a low cost knock-off—or to another instrument, such as an electric keyboard—simply because of a retail price increase in "high-end" electric guitars. *See TYR Sport*, 679 F. Supp. 2d at 1129-30 (finding "high-end competitive swimwear" to be sufficient to state a relevant product market).

Defendants next contend that a product market of "high-end" guitars and guitar amplifiers is insufficiently defined because, they suggest, the market contains a qualitative component that is ambiguous in the industry. See Dkt. 181-1 at 13:10-14:5. This argument is undermined by information gleaned in

discovery. In notes prepared by Guitar Center personnel from the NAMM trade shows that were produced in discovery, for example, Defendants' guitars and guitars amplifiers are referred to variously as "high-end" offerings or "high-end" guitars, The fact that persons in the industry are able to identify and distinguish products as "high-end" guitars or guitar amplifiers suggests that the product market definition in the complaint is sufficiently defined for pleading purposes. *See TYR Sport*, 679 F. Supp. 2d at 1129-30 (industry recognition of "high-end competitive swimwear" market supported the finding of a relevant product market).[14]

III. PLAINTIFFS' ALLEGATIONS AGAINST NAMM ARE PLAUSIBLE.

Contrary to NAMM's argument (Dkt. No. 181-1 at 18-22), Plaintiffs' allegations that NAMM joined with Guitar Center and the Manufacturing Defendants in a conspiracy to fix the retail prices of the Manufacturing Defendants' guitars and guitar amplifiers are plausible. As detailed in the FTC complaint referenced in Plaintiffs' allegations, NAMM's role in "arranging and encouraging the exchange among its members of competitively sensitive information, organizing meetings in which competing retailers of guitars and guitar amplifiers and others were permitted to an encouraged to discuss strategies for implementing MAPs, the restriction of retail price competition, and the need for higher retail prices," and in sponsoring discussions in which retailers and manufacturers "discussed the adoption, implementation, and enforcement of minimum advertised price policies, the details and workings of such policies, appropriate and optimal retail prices and margins, and other competitively sensitive issues" went far beyond its trade association function. (SAC ¶ 134-137). Plaintiffs also plead evidentiary facts, drawn from counsel's independent investigation, that not only connect the NAMM leadership to these endeavors, but demonstrate NAMM's motive and interest in furthering the conspiracy. (SAC ¶¶ 114, 115). These allegations contain sufficient factual matter, accepted as true, to state a claim against NAMM "that is plausible on its face." *Iqbal*, 536 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). *See also California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999) (holding that a trade association violates Section 1 of the Sherman Act

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[14] Defendants' cases are distinguishable. *See In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262 (N.D. Cal. 1988) (despite Defemdants' incorrect reference to the court "dismissing" claims, the cited decision was a summary judgment ruling in which the court heavily relied on the record); *Star Tobacco, Inc. v. Darilek*, 298 F. Supp. 2d 436 (E.D. Tex. 2003) (dismissal because of combined deficiencies in product *and* geographic markets).

and Section 5 of the FTC Act when it engaged in concerted action that has the principal tendency or the likely effect of harm competition and consumers).

IV. PLAINTIFFS' STATE LAW CLAIMS ARE WELL-PLEADED.

Plaintiffs' claims under California and Massachusetts law, while distinct from the Sherman Act claim, arise from the same allegations and assert the same price-fixing conspiracy.[15] Because Plaintiffs' Sherman Act claim is plausible, the state law claims also withstand Defendants' motion to dismiss.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss

DATED: April 20, 2012

Respectfully submitted,

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[15] California's Cartwright Act is similar in language and purpose with the Sherman Act, but has different origins and can yield different results in certain situations. *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App.4th 171, 183 n.9 (1999). The California Unfair Competition Law and the Massachusetts Consumer Protection Act are both broader than the Sherman Act, but are given similar application where the alleged unfair business practices concerns antitrust violations. *Chavez v. Whirlpool Corp.*, 93 Cal. App.4th 363, 375 (2001); *Suzuki of Western Mass, Inc. v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40, 50 (D. Mass. 2001).

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012 I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 20, 2012.

/s/ Elizabeth C. Pritzker
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